No. 17038

United States
Court of Appeals
For the Ninth Circuit

EQUITABLE LIFE AND CASUALTY INSURANCE CO.
Appellant,

vs.

VIRGIL N. LEE,
Appellee.

Appellant's Brief

Appeal from the United States District Court for the District of Oregon.

DONALD A. BUSS and
HOLLIE PIHL and
KENT HOLMAN and
ARTHUR NIELSON;
BUSS & PIHL,
1101 Executive Building,
Portland 4, Oregon,
Attorneys for Appellant.

ROLLIN E. BOWLES;
WEISER, BOWLES & YOUNG,
706 Weatherly Building,
Portland 14, Oregon,
Attorneys for Appellee.

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INDEX

Page

Statement of Jurisdiction 1-3

Statement of the Case 3

Statement of Facts 3-17

Specification of Errors 17-19

Summary of Argument 19-20

Argument 20-39

Conclusion 40

CITATIONS

Cases

Page

Browning v. Rodman, 268 Pa 575, 111 A 877, 111 At 877.... 37

Davis v. First National Life Assurance Society, Inc., of Atlanta, Georgia, 96 Fed Supp 393 (Dist. Court Alabama, 1951) 30

Farrington v. Granite State Fire Insurance Company of Portsmouth, 120 Ut 109, 232 P2d 754 38

Grange v. Penn Mutual Life Insurance Company, 235 Pa 320, 321, 84 At 392, 396 .... 24, 27, 28

Herman v. Mutual Life Insurance Company of New York, 108 F2d 678, 127 ALR 1464 .... 22, 25, 27

Massachusetts Bonding and Insurance Co. v. Anderegg et al, 83 F2d 622 (9th Circuit, 1936) 37

Pelton v. General Motors Acceptance Corporation, 139 Or 198, 7 P2d 263 30

Selman v. Shirley, 161 Or 582, 85 P2d 384 2

Sheppard v. Blitz, 1945, 177 Or 501, 163 P2d 519 .... 22, 38

Sublett v. World Insurance Company, 224 SW2d 288 (Texas 1949) 30

Union Deposit Co. v. Moseley (Texas Civ App), 75 SW2d 190 .... 31, 32, 34

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STATEMENT OF JURISDICTION

Appellant was sued by appellee in the United States District Court for the District of Oregon. In the complaint, plaintiff alleged various misrepresentations made by defendant's agents in connection with the sale of an insurance policy and asked for the sum of $3,000.00 general damages and the sum of $10,000.00 punitive damages (R. 3, 4, 5, 6). Appellant answered by a general denial (R. 7, 8). A pre-trial order was made and entered (R. 11, 12). Then an amended pre-trial order was made and entered. Defendant raised various defenses of waiver and affirmance and denied plaintiff's right to rescind the insurance contract (R. 13, 14, 15, 16, 17, 18).

Defendant's whole theory of defense was based upon the suit being brought by plaintiff to rescind the insurance contract and recover the premiums paid. Plaintiff by asking for $3,000.00 general damages plus interest on $1,000.00 at the rate of 6 per cent per annum from January 20, 1956, plus interest on $1,000.00 at the rate of 6 per cent per annum from January 20, 1957, and with interest on $1,000.00 at the rate of 6 per cent per annum from January 20, 1958, until paid, in effect asked to be placed in status quo (R. 5, 6). The premiums of $1,000.00 each were paid by plaintiff on each of the above dates. He was asking for a return of his money and at the trial plaintiff made tender of $100.00 in dividends received from defendant (R. 53).

All of this led defendant to believe that plaintiff was proceeding on a rescission theory. Many of defendant's defenses raised in the amended pre-trial order relate to a rescission action. Then, too, the leading case in Oregon on damages for fraud is *Selman v. Shirley*, 161 Or 582, 85 P2d 384, in which the Oregon Court subscribes to the "benefit of the bargain rule" as opposed to the "out-of-pocket" rule.

What plaintiff has really asked for in this case is rescission of the insurance contract. His damages then are limited to his "out-of-pocket" loss, for which he has asked. This amounts to $3,000.00 plus interest, which sum will not exceed the statutory amount of $10,000.00 necessary for diversity jurisdiction. Plaintiff is not entitled to punitive damages in a rescission action. For

these reasons the United States District Court for the District of Oregon lacked jurisdiction over this case.

This Court has jurisdiction over this case by reason of 1291 USC and 1294 USC.

STATEMENT OF THE CASE

In January, 1956, plaintiff purchased a 20-payment life insurance policy from defendant. Plaintiff now claims that various misrepresentations were made by agents of defendant which caused him to purchase this policy. Plaintiff paid three annual premiums at $1,000.00 each on the policy prior to the commencement of this action. Defendant claims that there was no fraud in the sale of the policy and in the alternative, contends that if there were actionable fraud in the sale of the policy, that plaintiff waived his rights by continuing with the policy and making payments thereon after receiving dividends and being informed of what dividends were expected to be paid on the policy.

STATEMENT OF FACTS

A Mr. Leo Rognlie, agent for Equitable Life and Casualty Insurance Co., first contacted the plaintiff, Dr. Lee, in the summer of 1955 (R. 32). According to Dr. Lee's testimony, he was first contacted about an accident and health insurance policy, he was not interested in that, but was informed by Mr. Rognlie of a profit sharing insurance policy, which would be a $16,000.00 insurance policy paid up in 20 payments, payable at the rate of $1,000.00 per year, considering Dr. Lee's age and health (R. 33).

From this profit-sharing policy, he would receive dividends over and above what an ordinary insurance policy might enjoy (R. 34). The doctor also mentioned something about stock splits, even though he knew he was not purchasing stock in the company (R. 35). He was left a book called "Hidden Ways to Wealth" by Mr. Myers, one of defendant's selling agents (R. 36). (Plaintiff's exhibit number 5.) Dr. Lee further testified that he was told that at the end of five to seven years, the policy would be self-supporting (R. 36). The plaintiff, in fact, got a 20-payment life insurance policy with a $16,074.00 face value for which he would pay $1,000.00 a year in premiums because he was 52 years of age at the time of issuance of the policy (R. 36). Any dividends left with the company would earn 3 per cent interest a year compounded annually (R. 37). The new policy was a profit-sharing policy in that the policy would participate in the profits of the company. Such profits would be composed of (1) savings in mortality, (2) profit from lapses, (3) interest in excess of reserve requirements, (4) savings from expense loadings and economy of management (R. 37, 38). Dr. Lee's testimony as to the representations made to him is that within a specified number of years, approximately seven years, closer to five, that this policy's earnings would be such that it would be self-supporting (R. 41). A first dividend would be payable by the company at the end of the second year the policy had been in force (R. 41). He further testified as to what dividend was represented

he would get. This started at 8 per cent and went as high as 11.9 per cent per year, representing, as he understood, the expected earnings of the company (R. 41). There was to be a total of 21.9 per cent paid to him which consisted of 10 per cent plus the 11.9 per cent for his age group (R. 42). The dividends payable were supposed to be accumulative on the premiums paid into the company. That is, at the end of the second year he would receive $219.00, at the end of the third year he would presumably receive $438.00, no dividend would be paid on the first year's premium. At the time the policy was delivered to Dr. Lee, Dr. Lee testified that he was told that he could anticipate very handsome dividends; the company was doing excellent business (R. 43). Dr. Lee further testified that he was given a yellow sheet of long hand computations concerning dividends before he bought his policy (R. 43). (Plaintiff's exhibit number 6.) He stated that Mr. Reklau, the general sales manager for the Portland office of the defendant, showed him the sheet or schedule (R. 43). Dr. Lee testified that he was told by Mr. Reklau that he (Reklau) anticipated 25 per cent minimum returns on this investment (R. 46). Figures on the sheet indicate that at the end of 20 years, Dr. Lee would get $443,373.00 for his investment (R. 47). The Court asked Dr. Lee if he did not get rather suspicious when Reklau was giving him these figures (R. 47). Dr. Lee replied that he was suspicious of the company and he tried to ascertain its position. He talked to representatives and financial advisors of

The First National Bank, the Weatherly Insurance Agency, the brokerage house of Foster & Marshall, and the president of the Underwriters Association, Mr. Sid Klein (R. 48). They advised him that he was either lucky or foolish; if it was valid, it was extremely good; if it was not, then it was not good (R. 48). The Court asked Dr. Lee if he really believed these representations and the witness, Dr. Lee, said in effect, "no" (R. 48, 49). In referring to the yellow sheet, plaintiff's exhibit number 6, Dr. Lee stated that Mr. Reklau used the various figures on the sheet to prophesize the future earnings of the policy (R. 51). By letter of January 20, 1958, from Lewis R. Rich, assistant secretary of defendant company, a $100.00 dividend check was sent to Dr. Lee (R. 52). (Plaintiff's exhibit number 8.) This letter stated that the dividend was 10% of the annual premium. Dr. Lee applied this check he received on January 20, 1958, to the payment of the third year's premium on the insurance (R. 52). A second dividend of $100.00 was sent by letter and check of January, 1959, to Dr. Lee (R. 52, 53). (Plaintiff's exhibit 17-b) (R. 52, 53). This letter also mentioned that the dividend was 10% of the annual premium. Dr. Lee states the first time he knew that the company was repudiating the statements made by Mr. Reklau with respect to dividends was in January, 1958 (R. 53). This was when the third premium was due and he had received his first dividend check of $100.00. After writing to the office and inquiring as to why the dividend earnings had failed to materialize,

Dr. Lee went ahead and paid the premium of $1,000.00 in January, 1958 (R. 53, 54). On cross-examination, Dr. Lee was asked about the dividend figures he had mentioned previously, and was asked upon what the agents based these figures (R. 55). He answered that the dividends would be forthcoming from the tremendous increase in business which was anticipated by the company from the volume of future business that it would do (R. 55). He was further asked: "In other words, this money that you were to receive by way of dividends was from anticipated earnings" (R. 55, 56). His answer was as follows: "Not entirely; that to begin with, the 3 per cent factor was in the policy, but the 8 per cent factor was there, that was, well, I believed he assured that we would—8 per cent would be about the minimum we would receive. This is verbal and not in writing; that is, I had no letters or documents from the agents or the company to sustain this, but I do have some words to that effect" (R. 56). This statement was supposedly made by Mr. Reklau (R. 56). Dr. Lee had purchased a second policy, this one for his minor son, one year after he had purchased his own policy (R. 56, 57). Dr. Lee states that he saw Mr. Reklau a number of times before he purchased his own policy (R. 57). Dr. Lee was then asked this question: "So you paid your third premium after knowing what your dividends were; correct?" Answer: "I had no way of ascertaining what my dividends were. I wrote to the company and asked what it was, and at the same time I received the denial of

all facts quoted to me." Prior to the time he received the $100.00 dividend, he did not know at any time that dividends that were represented would not be forthcoming (R. 59). The Court asked Dr. Lee the following question: "Then you wrote to the company for the statement as to where the other dividends were, and at that time you learned from them that there were no other dividends?" Answer: "That is correct, they denied the existence of any such rate schedule, the age group, or anything else of that nature" (R. 60). Officials from the State Department of Insurance were in his office twice asking questions and investigating the company during the summer and fall of 1957. After he talked with the State Insurance Department Officials, he paid the $1,000.00 premium for the third year of the policy (R. 60). After all this happened he was asked by the Court why he didn't write to the company first and ask them what the dividends were going to be. The witness in answer to this said: "Well, according to the way the information was given me, sir, they didn't know at the time, but it would be handsome. That was the expression used" (R. 60, 61).

Dr. Lee met with Mr. Ray R. Ross, General Sales Manager of defendant, on two occasions. The first time was late in 1956 or early in 1957 (R. 61). The second meeting with Ray Ross was on February 12, 1958, at Dr. Lee's office (R. 62). According to Dr. Lee's notes, Dr. Lee asked the following questions of Mr. Ross and received the following answers: "Are the dividends ac-

cumulative in successive years?" Mr. Ross answered, according to Dr. Lee's notes, "No, it can be—that is, $100.00, 10 per cent, or $200.00 the second year or whatever it happens to be in an increase as the shares of the unit came into effect. Now it can be 3 per cent as the policy indicates, if necessary. The dividend is 10 per cent at present or $100.00 per year regardless of the amount paid in; no earnings the first year due to the cost of handling the policy and such things as records in a business way. It might increase to 46 per cent dividend within the next two or three years, as in the case of the company in Oklahoma." The second question was, "Does the policyholder have any possibility of recovery of funds paid in when the policy was so old with fraud and misrepresentation by the district agent or agents of the company?" "No," was his answer, "the company is not responsible for any statement made by its general agent or agents regarding the fraudulent or misleading statements. The policy contains a clause protecting the company against any such act or acts" (R. 62, 63). At (R. 63, 64) Dr. Lee testified under cross-examination that the yellow sheet, plaintiff's exhibit number 6, applied to each individual policy separately. He also said that the same profit-sharing rate of earnings was to apply to both policies individually (R. 63). Earlier, he testified that the dividends on his son's policy because of his age group would be 7.7 per cent in addition to the regular 10 per cent dividend and that the earnings on his policy would be 11.9 per cent plus the 10 per cent, or 21.9 per cent (R. 42). Then

he states that the same profit-sharing rate of earnings was to apply to both policies individually (R. 63). He had said earlier that the yellow sheet was for both policies together (R. 43). Asked about the yellow sheet again, he says: "I remember certain figures there. I did not keep the sheet. I didn't have time for that. It was shown to me from that. The explanation of the potential and possible earnings of these policies and the volume of company business was projected for my benefit" (R. 64). Dr. Lee reaffirms that the schedule was shown to him by Reklau before he bought his own policy (R. 64).

Cecil I. Hust was the next called on behalf of plaintiff (R. 66). He testified that he started working for Equitable Life & Casualty Co. in September, 1954, and was with the company until the middle of 1957, or January, 1957 (R. 66). On cross-examination, Mr. Hust testified that the yellow sheet, plaintiff exhibit number 6, was given out by Mr. Reklau shortly after the company moved its offices to 32nd and Burnside Street in Portland (R. 69).

Dr. Lee was then recalled to the stand for continued cross-examination. He admitted that all of the figures set forth in his notes relating to profits would have come from anticipated earnings (R. 71, 72). Dr. Lee stated that he didn't really rely upon the yellow sheet, plaintiff's exhibit number 6 (R. 72). He read his policy when he received it and recalled that the Board of Directors determined what the dividends would be, and that the

policy was silent as to what the dividends would be (R. 73).

Neil D. Nadeau was next called in behalf of the plaintiff. He testified that he went to work for Equitable Life & Casualty Insurance Company in August or September, 1956, at 32nd and East Burnside Street in Portland, Oregon (R. 77). He testified he was given the pitch sheet, plaintiff's exhibit number 6, the day he went to work for Mr. Reklau (R. 77).

Don Pruitt was next to testify in behalf of the plaintiff. He was employed by Equitable Life & Casualty Co. from 1953 until the summer or fall of 1957 (R. 78, 79). According to Mr. Pruitt, he was present at several meetings with Mr. Ross in which the 20-payment life and profit-sharing policy was discussed (R. 79). During all of the time with the company, he never saw a document similar to plaintiff's exhibit number 6 (R. 80). When he first went with the company, Don Pruitt was shown a sheet showing the record of a policy issued by Kansas City Life Insurance Company and this showed that Kansas City Life Insurance Company paid dividends starting at 25 per cent for the first dividend and increasing 15 per cent a year to the end of the 20-year period. The witness, Don Pruitt, stated Ray Ross had made a statement that his company would pay at least as much in dividends as was paid by Kansas City Life (R. 80). Don Pruitt estimated that under these circumstances the policy would become paid up at the end of the 8th year (R. 81). He thought plaintiff's exhibit number 6

was passed out about the same time that he, Don Pruitt, left the company, or shortly thereafter (R. 81, 82).

Leo Rognlie was called as the defendant's first witness. Mr. Rognlie started working for Equitable Life & Casualty Co. in October, 1955 (R. 83). He was selling health and accident policies (R. 83). He first contacted Dr. Lee in December, 1955, or January, 1956 (R. 84). Mr. Rognlie saw Dr. Lee twice, alone. The first time they talked about an accident and health policy; the second time they discussed the profit-sharing program (R 85, 86). In a week or ten days after that, Mr. Reed Myers went with Mr. Rognlie to see Dr. Lee at Dr. Lee's office (R. 86). At this meeting, Dr. Lee was shown a specimen policy (R. 88). Mr. Rognlie and Mr. Myers showed Dr. Lee a copy of "Dunn's Reports", containing ratings of other companies who had a profit-sharing policy, the same kind as offered by Equitable Life & Casualty Co. These policies had paid out in six, seven, eight, or nine years (R. 88). It was at this meeting that Dr. Lee informed Mr. Rognlie and Mr. Myers that he had investigated the company (R. 89). Mr. Reklau was not at any meeting with Mr. Rognlie and Dr. Lee prior to Dr. Lee's signing his application for insurance (R. 89). Mr. Rognlie was the one who introduced Mr. Reklau to Dr. Lee and this was at least a month after the sale had been made (R. 89). Mr. Rognlie first came into contact with the long schedule known as plaintiff's exhibit number 6 in April or May of 1956 (R. 90). The schedule related to what could happen if a stock pool was set up

and a certain percenatge of dividends were put in the stock pool (R. 90, 91). This schedule related to a stock pool and not to the 20-pay life policy earnings as such (R. 91). In the summer of 1956, Mr. Rognlie discussed a profit-sharing policy for Dr. Lee's son (R. 92). At that time he brought Mr. Reklau with him to Dr. Lee's office and introduced the two men (R. 92). An application was made out for his son for the same amount in premiums as for Dr. Lee (R. 92). It was explained to Dr. Lee at the time Dr. Lee's policy was sold that the first dividend would be due at the end of the second year of policy (R. 92, 93). It was mentioned to Dr. Lee that a 10 per cent dividend had already been decreed by the Board of Directors. This would be for the policy year of 1956 (R. 93). In anticipating what Dr. Lee's policy might earn, it was mentioned to him what other companies had done on profit-sharing policies in the past (R. 94).

Next to testify for the defendant was another selling agent, Osborne R. Myers. He began working for the company in June, 1954 (R. 99). He started selling the profit-sharing policy for the company which had recently been approved by the State of Oregon Insurance Commissioner (R. 99). Mr. Myers testified that the first contact was made with the plaintiff, Dr. Lee, in December, 1955. Mr. Myers explained the profit-sharing program and contract to Dr. Lee, that the purpose of selling profit-sharing contracts was to place them with people of influence in the community so that the com-

pany in selling regular, ordinary types of insurance would be able to use these names for references (R. 100, 101). Every insurance company of any type at some time or another in order to expand has had to place out a certain number of these profit-sharing contracts (R. 100, 101). Mr. Myers told Dr. Lee that no company could guarantee a profit, but that the company did expect to pay a 10 per cent dividend to start (R. 103). To the best of his knowledge, the premium paid for the policy was standard for a 20-pay life policy insuring a person of age 52. (R. 104, 105). At the second meeting with Dr. Lee, Dr. Lee had a copy of "Best's Reports." This book gives a complete breakdown of every insurance company in the business. At this time, there were only two or three million dollars on the books for Equitable Life & Casualty Company. Mr. Myers explained to him this was the reason the contracts were being placed so as to get more business, and as the company grew he would share in the profits proportionately (R. 107). The company stopped writing the profit-sharing policy in September or November in 1957, there were only to be a limited number of the policies issued (R. 108). Mr. Myers explained accumulative dividends. If the dividends were put back in the company, they would draw interest and the policy would pay out in a much shorter length of time (R. 86). Otherwise, if the dividend is taken out every year, the policy has to take 20 years to pay out (R .109). It was to be a straight 10 per cent dividend on the current year's premium. As the

business would increase and profits would be more, profit-sharing contracts would receive more in the way of dividends (R. 109). Mr. Myers testified that he never used the yellow sheet or schedule, plaintiff's exhibit number 6, and Dr. Lee's information concerning this came through his personal contacts with Mr. Reklau after he had taken out the policy for himself (R. 110). Dr. Lee later bought a policy for his son.

Mr. Raymond R. Ross, assistant general manager and superintendent of agents for the Equitable Life & Casualty Co., was next to testify on behalf of the defendant (R. 115, 116). Mr. Ross testified that he first met Dr. Lee in October, 1957, at Dr. Lee's office (R. 116). Mr. Ross had come to talk to Dr. Lee because of some correspondence they had had concerning the insurance policy and also a $2,000.00 investment that Dr. Lee had made with Mr. Reklau, personally. Dr. Lee had supposedly given Mr. Reklau $2,000.00 to purchase stock, and he was concerned about it (R. 116, 117). At this meeting Mr. Ross told Dr. Lee the size of the dividend, 10 per cent, and that they were not accumulative on premiums paid. He further told him that dividends could not be guaranteed, as it was impossible to guarantee future earnings of the company (R. 118). At this point Mr. Ross testified that Dr. Lee said: "All right, I now have three months to decide whether or not to make my next premium payment" (R. 119). Subsequently, Dr. Lee did make his next premium payment after receipt of a 10 per cent dividend (R. 119, 120). Dr. Lee did not

mention the plaintiff's exhibit number 6 projection schedule to Ray Ross during that meeting in October, 1957 (R. 119). Mr. Ray Ross visited again with Dr. Lee in about February of 1958; this was one month following the first dividend payment and third premium payment (R. 119). They discussed the $2,000.00 that he had given to Mr. Reklau and no discussion was had about the dividends payable on the policy. In October of 1957, Dr. Lee asked Mr. Ross' opinion in regard to when the policy would be paid up. Mr. Ross said that most participating policies pay up in approximately 16 or 17 years, but because of the special features of this policy, there was a good likelihood it would pay up in approximately 14 years (R. 120). To Ray Ross' knowledge, when the company received the third year premium payment in January of 1958, there was no letter accompanying it from Dr. Lee (R. 121). The letter from Dr. Lee concerning dividends was received by Mr. Ross prior to his first meeting with Dr. Lee, which meeting was held in October, 1957 (R. 121). The testimony of Neil Nadeau concerning when the long projection sheet first came out is incorrect as indicated by the testimony and records as to when Mr. Nadeau first went to work for Equitable Life & Casualty Co. (R. 122, 123).

Equitable Life & Casualty Co. used the Commission Standard Ordinary Table of 1941 for the 20-payment life policy that it issued (R. 124). This is the same table used by New York Life Insurance Company at that time (R. 124). Under this table, the rate for Dr. Lee

was $62.21 per thousand, and this was what was charged as premium (R. 125).

Mr. Frank T. Wetzel was called as the next witness in behalf of the defendant. Mr. Wetzel is General Counsel for the Equitable Life & Casualty Insurance Co. He was with Mr. Ross when the meeting was had with Dr. Lee in October of 1957 in Portland (R. 131). Mr. Wetzel's main interest in the meeting was to see whether the company was involved in the $2,000.00 Dr. Lee had given to Mr. Reklau (R. 131). Mr. Wetzel listened to the conversation as Mr. Ross explained Dr. Lee that the only dividend authorized was a 10 per cent dividend, that is 10 per cent of whatever the annual premium was. It was made quite clear to Dr. Lee that it was not paid on an accumulative premium, but only on an annual premium. This appeared to at least be disappointing or perhaps shocking to Dr. Lee. Dr. Lee said he didn't know what he was going to do about it, but he had several months to think about it. The premium was not due until the first of the year, which gave him probably three or four months to decide what he wanted to do (R. 132).

SPECIFICATION OF ERRORS

(1) Finding of Fact II is erroneous in that the amount in controversy did not exceed $10,000.00. The action is in the nature of a rescission of the insurance contract in which case punitive damages are not recoverable.

(2) Finding of Fact IV is erroneous in that no such representations were made and the Finding is against the weight of the evidence.

(3) Finding of Fact V is erroneous in every detail; the representations made were not material, false, and known by the agents to be false and were not made knowingly and willfully, and such representations, if made, were not within the scope of employment of the agents, and the Finding is against the weight of the evidence.

(4) Finding of Fact VI is erroneous in that plaintiff did not rely upon these representations. Further, such representations were not made. Plaintiff relied upon the advice of others; insurance brokers, stockbrokers and bankers. This Finding is against the weight of the evidence.

(5) Finding of Fact X is erroneous in several respects. The action filed was not a damage action as that action is understood by the law of Oregon. Further, plaintiff did not affirm the contract, by paying another premium after discovery of fraud, rather, he waived the fraud, if any, and all his rights to recover for fraud.

(6) Finding of Fact XI is erroneous as not proved by the weight of the evidence. Punitive damages against a corporation are not allowable in this kind of a case, where the only fraud alleged is by selling agents of the corporation.

(7) Conclusion of Law I is erroneous for reasons heretofore and hereafter set forth in The Statement of Jurisdiction.

(8) Conclusion of Law II is erroneous in that plaintiff by his conduct after learning of the alleged fraud waived his rights to sue for fraud. Further, defendant still contends that the action brought was in rescission.

(9) Conclusion of Law III is erroneous for the same reasons set forth in Specification of Error 6.

SUMMARY OF ARGUMENT

(1) This action brought by the plaintiff is a rescission action for the recovery of premiums paid on a life insurance policy, all as evidenced by the Pleadings, Pre-Trial Order and Proceedings had during the trial of the case. Plaintiff is not entitled to obtain puntive damages in addition to a rescission of the insurance contract. The amount in controversy under the rescission action is $3,000.00, therefore the Federal Courts lack jurisdiction in this case because the amount in controversy is less than $10,000.00.

(2) Plaintiff is not entitled to change the theory of his case from rescission to an action for damages for fraud after the Pleadings are complete, Pre-Trial Order has been entered and trial of the case has been had.

(3). The Findings of Fact and Conclusions of Law are not supported by the evidence.

(4) A corporation is not liable in punitive damages for the wrongful act of its menial agents, in this case

the salesmen, unless such act was authorized or ratified. There is no evidence in this case of authorization or ratification.

(5) Plaintiff, since his alleged discovery of the alleged fraud or misrepresentation, has by his course of conduct affirmed his insurance contract with defendant and can no longer elect to rescind the contract.

(6) Plaintiff has not attempted to make restitution to defendant by tendering up to defendant the $100.00 dividend received and the insurance policy on his life, and therefore, plaintiff is not entitled to rescission of the insurance contract.

(7) Plaintiff, by his course of conduct since his alleged discovery of the alleged fraud or misrepresentation, has waived any fraud or misrepresentation of defendant's salesmen in the sale of the insurance policy to plaintiff, and therefore plaintiff not now is entitled to rescission of the insurance contract.

(8) Plaintiff has failed to act promptly in rescinding the insurance contract upon his discovery of the alleged misrepresentations of defendant's salesmen and is no longer entitled to rescind the contract.

(9) Plaintiff did not rely upon the representations of the selling agents in entering into the insurance contract with defendant.

ARGUMENT

(1) This action brought by the plaintiff is a rescission action, for the recovery of premiums paid on a life insurance

policy, all as evidenced by the Pleadings, Pre-Trial Order and Proceedings had during the trial of the case. Plaintiff is not entitled to obtain punitive damages in addition to a rescisson of the insurance contract. The amount in controversy under the rescission action is $3,000.00, therefore, the Federal Courts lack jurisdiction in this case because the amount in controversy is less than $10,000.00.

The argument against jurisdiction in this case is the same as the argument contained in The Statement of Jurisdiction of this case.

(2) Plaintiff is not entitled to change the theory of his case from rescission to an action for damages for fraud after the Pleadings are complete, Pre-Trial Order has been entered and trial of the case has been had.

The theory of the case was one of rescission throughout. The question was expressly left open at the end of the hearing of the case whether plaintiff had waived the fraud so as to preclude him from recovering. The questions discussed were whether he had a right to rescind (R. 137-143). Plaintiff said he was prepared to return the $100.00 which he received from the company (R. 53). This indicates that plaintiff and plaintiff's attorney thought it was a rescission action when the case was tried.

(3) The Findings of Fact and Conclusions of Law are not supported by the evidence.

The Court found that there was fraud in the sale of this insurance contract, and further found that there had been no waiver of the fraud by the plaintiff.

It is axiomatic that the layman's sense of grievance is not coterminus with an invasion of legal rights.

The burden of proof is on the plaintiff to prove fraud by a preponderance of the evidence. *Sheppard v. Blitz*, 177 Or 501, 163 P2d 519. The question before this Court is "Was there actionable legal fraud in this transaction?" *Herman v. Mutual Life Insurance Company of New York*, 108 F2d 678, 127 ALR 1464, is a case in which an action was brought by Max Herman for breach of contract and avoidance of an annuity policy. The facts of that case as set forth by the Court are essentially as follows: "The plaintiff purchased insurance from the defendant company in May, 1932, for a single premium of $60,745.71. That insurance was in the form of a policy known as an 'Annuity Certain Followed by Deferred Life Annuity.' The sale was made by a duly authorized agent of the company, who, in what might almost be called the duly authorized manner, presented his prospect with a rather complicated table of figures in five columns and an accompanying textual explanation. This table showed the insured how he could withdraw $300.00 a year for 19 years (duration of the annuity certain) to augment his guaranteed income of $3,300.00 and still be able to include in his coverage a five-year retirement income contract to begin at the age of sixty-four. These withdrawals were to be made from the dividends which are a usual feature in mutual insurance contracts. Huebner, Life Insurance, P. 379. The dividend amounts are set forth in column

one and in the following explanation their total appears under the caption 'income from dividends per 1932 scale.'

"The plaintiff paid his premium, accepted his policy, and enjoyed its benefits for six years. At the end of that time, no doubt in a moment of depression, he compared the dividends he had received, $2,180.69, with the corresponding figures, $4,412.93, appearing in column one above referred to. He then seems to have emitted a figurative cry of distress at the discrepancy of $2,232.21 thus appearing."

The Court goes on in pages 679 and 680 of the opinion to discuss the facts necessary to support rescission of the contract and states:

> "Rescission may be had because of mutual mistake on his part and the company's part or because of representations innocent or otherwise flowing from the insurance company to him. Further, he must proceed with reasonable promptness. Rescission for mistake will not lie here because mistakes relieved against do not lie in the field of prediction. They must be as to present and existing facts. We can also dismiss any idea of fraud and so of fraudulent representations. There is no assertion whatever that the agent acted in anything but the best of faith in submitting his columnar analysis.
>
> "Do these innocent (and here even non-negligent) but, in the event, mistaken figures furnish ground for rescission? The weight of authority does not stress the moral angle in granting rescission in equity at least. Williston on Contracts, Section 1500, Page 41, 89, 23 Am. Jur. Sec. 134, Page 931, 17 CJS, Contracts Sec. 147, Page 502, and cases cited thereon. There are, however, two reasons which on both principal and authority, fortunately,

preclude recovery here. Each go to the character of the representation and in truth each one in substance makes the representation less than that. In other words, and in the terminology of the American Law Institute, the 'misrepresentation' is rendered 'immaterial'. 2 Restatement of Contract Sec. 476 (1).

"Plainly, all statements must be considered against their background. If that background precludes reliance by the recipient no wrong to him follows from their eventual unreliability. The preclusion here is not single, but double. *It arises, first, from the character of the insurance business and, second, from the difference between present fact and future prophesy*. The cases hold, and sensibly, we think, that statements as to accumulations, dividends, surplus, etc., made in the sale of life insurance are mere illustrations or estimates and their subsequent inaccuracy is no ground for redress. Cf. 2 Restatement of Contracts Section 470 (2). They are collected in an excellent note in 22 ALR 1284." (Emphasis supplied.)

The Court in the Herman case quoted from a Pennsylvania case, *Grange v. Penn Mutual Life Insurance Company*, 235 Pa 320, 321, 84 At 392, 396.

"* * * he, (the assistant secretary) said that, 'on a fifteen year policy for $25,000.00, the insured beginning at the age of 41 would receive at the end of the term a paid-up policy for the same amount and an estimated sum of $7,800.00 in cash, and that, while they always put the word "estimated" in, witness could rely on getting the amount named; that it was the rule of the company to be always on the safe side, and never to put out an inflated estimate * * *'

"Counsel for the appellant contends that these statements of the assistant secretary of the company were misrepresentations of material facts and that the company should be held responsible to him on damages for the deceit which he alleges was practiced. But with respect to this matter the trial judge found that the evidence of misrepresentation was not sufficiently clear, precise and indubitable to demand a reformation of the policy, and that the misrepresentations were concerned with matters which were the subject of estimate merely, and not of concrete fact, and therefore, they do not support the appellant's allegation of fraud in the making of the contract. He further held that it was not within the power of the assistant secretary to bind the defendant company by any representation, in such a manner as to give to the plaintiff any advantage over other policyholders in the company. The Court also found that the representation made by the assistant secretary, that the estimate was based on the past experience of the company, did not constitute such deceit as would justify recovery of damages by appellant, or would entitle him to an accounting by the company. These conclusions seem to us to reasonably follow from the evidence concerning the matter in question."

Continuing the quote from the Herman case at Page 681:

"The cases also hold, and again sensibly, we think, that erroneous assertions of future fact are not actionable in the absence of *a showing of knowledge of falseness*, 23 Am Jur, Section 35, 36, Pages 794-798; 17 CJS Contracts, Section 157, Page 509; Cf. 2 Restatement of Contracts, Section 474 * * *" (Emphasis supplied.)

"Our interpretation avoids any question of the reasonable promptitude requisite to the right of

rescission. The text books and writers make that, as the qualifying adjective suggests, a matter of the circumstances of each case. 17 CJS, Contracts, Section 432, Page 914; Williston on Contracts, Section 1526, Pages 4273 etc.; 1526, Page 4273 etc.; 4 Cooley Briefs on Insurance (2d Ed.) 4711-4716; 2 Black, Rescission and Cancellation, Section 478. Here the plaintiff discovered the alleged misrepresentation in 1933 when he received the first dividend in an amount some $150.00 less than column one predicted. He waited five years and received five more 'short' dividends before demanding and obtaining his new and presumably more satisfactory policy. Even under the stricter English Rule this would seem a pretty long time. A mutual insurance company must make calculations based on certainty and overhanging rescissions are not conducive to stability. However, the element of circumstance is difficult to appraise from the face of the pleadings and we need not do so. We spoke earlier of the complaint's reference to 'promise'. It requires a straining construction to give the use of that word therein its ordinary meaning. This because the context indicates its selection in the same sense as its accompanying 'statement' and 'representations'. Conceding, however, a broader meaning of warranty and the right to rescind for breach thereof, 5 Williston on Contracts, Section 1462, Page 4089, the plaintiff is no further forward. We have pointed out two fatal vices in the statement qua representation. It is probable that what we are about to mention constitutes an additional vice. But whether it does or not, it is an absolute bar to any action, qua breach. 5 Williston on Contracts, Section 1630, Page 4560. Any such promise with respect to a life insurance contract in a mutual company, is 'illegal and void'. The nature of mutuality prescribes it and we hardly need the explanation of the Pennsylvania Supreme Court in the case above cited.

That Court said, 'It will not do to construe the contract in this case an agreement by which the company was bound to guaranty to appellant a certain definite amount of surplus. That was something which from the circumstances, the future alone could determine. *It depended, for one thing, largely upon a number of lapsed policies, which could not be foretold.* The company is a mutual one, and its accumulations all the policyholders had the right to share in the proportions fixed by the terms of their contracts. Whatever representation may have been made to appellant, he is and can be entitled to nothing more than his proportionate share of the surplus which actually accrued. It is obvious that a mutual insurance company cannot discriminate among its policyholders, and any agreement which would result in the payment of the larger proportionate dividends to one of its policyholders than to others in the same class, would be illegal and void.' Grange v. Penn Mutual Life Insurance Co., 235 Pa 320, 321, 84 At 392, 396. (Emphasis supplied.)

"We question any real innocence on the part of plaintiff here. *Dividend is a widely known technical term and is relative to problematical earnings and not absolute to the payment of fixed sums.* See Kehl, Early American Dividend Law, 53 Harvard Law Review 36. Even assuming, however, a greater excusableness, the public policy is, we think, against relief from the transaction, 17 CJS, Contracts, Section 272, Page 656. It might be noted that the right to rescind for breach of warranty is also subject to the laches rule. 5 Williston on Contracts, Section 1463, Page 4092." (Emphasis Supplied.)

As might be expected from the above quoted portions of *Herman v. Mutual Life Insurance Co. of New York*, supra, the Court found that the plaintiff had no right

of rescission of the original insurance contract and in fact found no material misrepresentations. Looking at the insurance policy in question in our case, it is a profit-sharing policy in "an old line capital stock legal reserve company" and the profit-sharing consists of the right to participate in the profits of the company. Such profits shall be composed of (1) savings in mortality, (2) profits from lapses, (3) interest in excess of reserve requirements, and (4) savings from expense loadings and economy of management. This profit-sharing policy in an old line capital stock reserve company is very similar to dividends expected to be received by members of a mutual insurance company. The number of lapsed policies cannot be foretold and the savings in mortality, savings from expense loading and an economy of management and savings or profits from interest in excess of reserve requirements cannot be foretold in advance. The statements of the agents made to Dr. Lee were mere prophecies of what might happen, based on experiences of other companies and, of course, they were dependent upon the profits of the company from the various items mentioned. No one could say in advance what those profits would absolutely be, but only estimates could be made. The doctor should certainly have been aware of this. It has not been shown that the agents knew they were making false representations in the sale of the policy.

Grange v. Penn Mutual Life Insurance Company, 235 Pa 320, 84 At 392, is another case which is very much in

point with our case. Plaintiff filed a bill in equity against the defendant, the Penn Mutual Life Insurance Company of Philadelphia, praying for specific performance of a contract of life insurance in accordance with its terms, and for an accounting, and for discovery in aid of his proof. Policy issued by the defendant company to plaintiff for $25,000.00 was known as the "accumulated surplus" plan. Ten annual premiums were payable and he paid them all. It was stipulated in the policy that the accumulated surplus period would end 15 years from the issuance of the policy. At the expiration of the 15-year period, he accepted one of the options secured to him in the policy, which permitted him to withdraw the accumulated surplus apportioned to the policy and take a full paid policy for the sum of $25,000.00. The defendant company offered to pay him, as his share of the apportioned surplus, the sum of $3,347.15. The plaintiff declined to accept this amount, claiming he was entitled to the sum of $7,800.00, in accordance with an estimate which was given to him by an officer of the company when he negotiated with it for the policy. Plaintiff alleges he was induced to take the policy by reason of this estimate, and through representations made to him by the assistant secretary of the company. An estimate of $7,800.00 had in fact been made, this was admitted and the estimate was accompanied by a statement that the defendant company did not furnish inflated estimates.

The company alleged the sum offered was the full and fair share of earnings of the company during the time he held the policy and also of company's surplus and from forfeiture of other policies in his class. The Court held there was no fraud.

Two other cases of interest are *Davis v. First National Life Assurance Society, Inc., of Atlanta, Georgia,* 96 Fed Supp 393 (Dist. Court Alabama, 1951); and *Sublett v. World Insurance Company,* 224 SW2d 288 (Texas, 1949). The *Davis* case, supra, was concerned with a lottery type of insurance policy in which the Court held there was no relief available to plaintiff. The failure of the plaintiff to fully understand the type of policy and the method of paying dividends was insufficient to sustain the allegations of fraud in securing the application.

(4) A corporation is not liable in punitive damages for the wrongful act of its menial agents, in this case the salesmen, unless such act was authorized or ratified. There is no evidence in this case of authorization or ratification.

The holding of the Oregon case, *Pelton v. General Motors Acceptance Corporation,* 139 Or 198, 7 P2d 263, is that a corporation is not liable in puntive damages for the wrongful act of its menial agents, unless such act is authorized or ratified. The Trial Court in our case found as a fact that the representations made by the selling agents, Mr. Myers and Mr. Rognlie, were "material, false, and known by them to be false, and were made knowingly and willfully." Yet, there is no evidence in the case to support the finding that the representations

were made willfully by the two selling agents or that they knew the representations they were making were false. There is also no evidence in the record to show that the company authorized or ratified any such representations. On the contrary, the assistant general manager, Ray Ross, acquainted plaintiff in October, 1957, with all the facts concerning the policy. None of the representations alleged by plaintiff were authorized or ratified by the company.

Fletcher, Cyclopedia of Corporations, Permanent Edition, Volume 10, Section 4906, page 494 et seq., contains an excellent discussion concerning the award of punitive damages against a corporation. The general rule stated therein is that the acts of the servant which constitute fraud, malice, gross negligence, or oppression, must have been committed by the direction or authority of the master, or must have been ratified and adopted by the master as his own acts, or the master must have participated in the acts, or must have been guilty in the selection and employment of the servant doing the acts complained of. In shorter and more concise language, the principal must have participated in some way for it to be responsible for the acts of the agent. The ratification of the servants' acts must be clear and unequivocal.

A leading case in this field of the law is *Union Deposit Co. v. Moseley* (Texas Civ. App.), 75 SW2d 190. There is some similarity between the allegations of plaintiff in our case and the allegations in the Moseley case,

although the Moseley case is concerned with investment bonds.

In *Union Deposit Co. v. Moseley*, supra, the plaintiff, appellee, Mrs. Moseley, sued the Union Deposit Co., to cancel its investment bond issued to the appellee and to recover $480.00 paid on the bond, with interest thereon, as actual damages, and $2,000.00 as exemplary damages, alleged to have resulted from the fraud practiced upon her by appellant's agents and officers, induced her to purchase and pay the $480.00 on her bond. The jury returned actual damages and $800.00 punitive damages. Appellee alleged in testifying in substance in January, 1928, certain agents of appellant called upon and represented to her that any money paid by her on a $5,000.00 accumulative investment bond would bear 7½ per cent interest compounded annually; that she could withdraw any money she paid in at any time, then she would not have to make any payment for one year after making her first payment; and if she paid $210.00 per year for 15 years, she would have coming to her the sum of $5,000.00. She paid the agent $420.00, being $210.00 for two years. She relied upon the statements of appellant's agents and would not have paid the $420.00 but for such representation. When the bond came, she looked at it, saw that it was from appellant company, and placed it in her document box in the bank, without reading it, relying upon the statements of the agent that it contained conditions and provisions as represented by them; then she later discovered that the bond

did not contain any such provisions. About one year afterward, she received notice from appellant calling for further payment on the bond, and in reply, wrote that she did not understand that she had to make such payment. Thereafter in April, 1930, another agent of appellant called upon her and induced her to transfer her investment to another type of bond issued by appellant and by paying $60.00 additional and surrendering her old bond, she could withdraw the money she had thus paid in at any time at 7½ per cent interest compounded, and in addition, if she left the $480.00 paid in for 12½ years, she would get back $1,314.40. These statements were later confirmed by Durell, the agent, in a letter. She took Durell's letter to the head office of appellant in Denver, Colorado, in September, 1930, and S. W. Clark, its Vice-President, and E. G. Bandy, State Manager, confirmed the statements contained in Durell's letter. Upon returning home, she mailed appellant her first bond and received in a few days the one sought to be cancelled by this suit. She saw the bond was from appellant and placed it in her bank box, and without reading it, relying upon the representations of the agent and officers of appellant that it contained the conditions and provisions above mentioned. The conditions of payment were set forth in each bond, when the amounts were payable, etc. The application for the second bond and the bond contained the agreement of appellee to pay $800.00 per year for 5 years on the investment trust bond, etc. Both the application and the

bond recited that any statement of any agent in variance with the bond would not be binding upon appellant.

Quoting at page 193 of the opinion in the *Moseley* case, supra:

> "We sustain the contention of appellant that the evidence was legally insufficient to fix its liability for exemplary damages resulting from the fraudulent action of its officers or agents, which induced appellee to purchase the second bond. In both the Lane case and the Baxter case, supra, this Court held that evidence similar in all respects to that adduced herein was insufficient to fix liability of the corporation for exemplary damages resulting from the fraudulent act of its agent, under the settled rule, that 'either the act must have been previously authorized by the principal, or subsequently ratified or approved by the principal, with full knowledge of the facts.' "

Clark was Vice-President and Treasurer of the appellant, and E. G. Bandy was State Manager of the appellant at the head office. Quoting at page 193 of the opinion:

> "There was no evidence showing or tending to show that either of these officers were specifically authorized to act as the alter ego, or in place of the corporation, or was placed in complete charge of this business, and clothed with full authority to represent in respect to the fraud alleged. The mere fact that the officer is Vice-President or State Manager of sales of the corporation, does not bind the corporation for exemplary damages resulting from the fraud of such officers, unless it knowingly authorized and ratified the fraud; and it is generally held that the powers of the corporation are vested in its Board of Directors, and that the President,

Vice-President, Secretary, Treasurer, or Manager, has no authority to represent or bind the corporation except as such authority has been conferred by the Board of Directors; and that in the absence of evidence showing that such an officer was authorized to act for the corporation in practicing a fraud, or that the corporation in some manner knowingly authorized or ratified the fraud, it is not liable for exemplary damages resulting from the fraud of such officer or agent."

Oregon law is very sketchy on this point, but appellant believes the general rule is stated in the Moseley case and should be followed by this Court.

(5) Plaintiff, since his alleged discovery of the alleged fraud or misrepresentation, has by his course of conduct, affirmed his insurance contract with defendant and can no longer elect to rescind the contract.

(6) Plaintiff has not attempted to make restitution to defendant by tendering up to defendant the $100.00 dividend received and the insurance policy on his life, and therefore, plaintiff is not entitled to rescission of the insurance contract.

(7) Plaintiff, by his course of conduct, since his alleged discovery of the alleged fraud or misrepresentation, has waived any fraud or misrepresentation of defendant's salesmen in the sale of the insurance policy to plaintiff, and therefore, plaintiff not now is entitled to rescission of the insurance contract.

(8) Plaintiff has failed to act promptly in rescinding the insurance contract upon his discovery of the alleged misrepresentations of defendant's salesmen and is no longer entitled to rescind the contract.

The above four points are grouped together because they are concerned with the question of waiver of the fraud.

In October of 1957, Mr. Ray Ross, General Manager of Equitable Life & Casualty Insurance Company, and Mr. Frank Wetzel met with Dr. Lee at Dr. Lee's office in Portland, Oregon. At this time the dividends that were to be paid by the company were fully explained by Mr. Ross to Dr. Lee. Dr. Lee was told by Mr. Ross that there would be no accumulations of dividends and that the coming dividend would be ten per cent (10%) of the annual premium. This testimony was not rebutted by plaintiff, and in fact is the Court's Finding of Fact VIII. At the above described meeting, after the dividends to be paid had been explained by Mr. Ross, Dr. Lee made the following statement: "Well, I have three months to make up my mind whether to continue with the policy." This statement of Mr. Ross and Mr. Wetzel concerning the statement made by Dr. Lee was not rebutted by plaintiff.

On January 20, 1958, a One Hundred ($100.00) Dollar dividend was sent by defendant to plaintiff, together with a transmittal letter from the company stating that this dividend was 10 per cent of the annual premium. (Plaintiff's exhibit No. 7.) Shortly thereafter, the plaintiff cashed the dividend and used it to pay the next premium on the policy together with a Nine Hundred ($900.00) Dollar check of his own.

Defendant's Exhibit No. 16, a letter of January 19, 1959, from Rollin E. Bowles, Attorney for Plaintiff, to defendant, Equitable Life & Casualty Insurance Company, the closing paragraph of which is as follows:

"Upon this litigation being terminated, Dr. Lee reserves the right to then make a determination as to whether or not the cash surrender value option will be exercised or paid-up insurance will be taken."

The testimony of the case indicates that the fraud, if any, upon plaintiff by defendant's agents was discovered by plaintiff not later than October, 1957. After October, 1957, the plaintiff waited three months and took no action, then he received and retained a One Hundred ($100.00) Dollar dividend; paid the next premium on the policy after receipt of dividend; a year later he had his attorney write a letter to the company reserving his rights to act under the non-forfeiture provision of the policy after the termination of litigation.

The authorities are many and numerous that a person can waive his right to rescind a contract or to sue for fraud by not acting promptly in giving notice of rescission or by acting in such a manner as to continue on the contract and by doing affirmative acts which recognize the contract as being in full force and effect.

Defendant, in support of its contention that plaintiff has waived his right to rescind or to sue for fraud by doing the above enumerated positive acts waiving the fraud, submits the following authorities:

Massachusetts Bonding and Insurance Co. v. Anderegg et al, 83 F2d 622 (9th Circuit, 1936).

Browning v. Rodman, 268 Pa 575, 111 A 877, 111 At 877.

Farrington v. Granite State Fire Insurance Company of Portsmouth, 120 Ut 109, 232 P2d 754.

Sheppard v. Blitz, 1945, 177 Or 501, 163 P2d 519.

The *Rodman* case, supra, states the general rule at page 878 of the opinion:

> "One induced by fraud to make a contract, may on discovery of the fraud, either affirm the contract and sue for damages, or, as here done, assert them by way of a counterclaim in a direct action on the contract, or in any manner growing out of it, or he may repudiate the contract and institute an action for a rescission thereof (13 Corpus Juris, sec. 653); but if the subject of the sale or contract is open to the buyer's observation, or by reasonable inquiry its true condition might have been ascertained, he is bound to examine or inquire for himself and trust his own judgment, or insist on a warranty from the vendor (Veasey v. Soton) 3 Allen (Mass.) 380; and, in an action for deceit, based on fraud in the procurement of a contract thus affirmed, an important distinction exists with respect to acts done in affirmance of the contract after discovery of the fraud. If the defrauded party acquires knowledge of the fraud, while the contract remains executory, and thereafter does any act in performance or affirmance of the contract, or exacts performance from the other party, he thereby condones the fraud and waives his right of action."

(9) Plaintiff did not rely upon the representations of the selling agents in entering into the insurance contract with defendant.

This could be better stated by saying that Dr. Lee in this case has attempted to convert an estimate into a firm bid or guarantee. The amount of dividends to

be paid in the future could not possibly be guaranteed, and plaintiff knows this as well as anyone. As to whether the investment would be good or bad, plaintiff knew it was a speculation as indicated by the comment of the banker and insurance broker whose advice plaintiff sought. The investment in the expansion of any small, young company is always a speculation. The truth of the matter is that the so-called misrepresentations of appellant's agents may yet come true and the Doctor may wish he had continued longer with his policy. This was, of course, the Doctor's intention when he continued on the policy after being informed by Mr. Ross of the dividends expected to be paid.

CONCLUSION

Firstly, it is contended that the Trial Court had no jurisdiction over this case. Secondly, the representations as alleged were representations of future facts; estimates and prophesies of future happenings, and as such the representations cannot be a basis for actionable fraud. Thirdly, Dr. Lee was not entitled to rely upon these representations because it is only common sense and common knowledge that the earnings and dividends of a company cannot be guaranteed. There was no guartee given here, merely an estimate of what might happen in the future. Fourthly, Dr. Lee has by his actions after discovery of the so-called fraud, waived any right of action which he might have had. Fifthly, Dr. Lee is not entitled to puntive damages in this case by reason of the fact that the company has not authorized or ratified the actions alleged.

Respectfully submitted,

Donald A. Buss and
Hollie Pihl and
Kent Holman and
Arthur Nielson;
Buss & Pihl,
Attorneys for Appellant.